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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

SAMUEL EVANS MASSENGILL, Petitioner

vs.

J. T. WILSON, Administrator of the Estate of Pearl Locklair, Deceased, Respondent

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PETITION

Petitioner prays this Court to review on writ of certiorari the judgment of the United States Circuit Court of Appeals for the Sixth Circuit in the case there styled J. T. Wilson, Admr., of the estate of Pearl Locklair, deceased, appellant, vs. Samuel Evans Massengill, doing business as the S. E. Massengill Company, appellee, No. 8751, rendered on the 9th day of January, 1942 (R. 14), and based upon a written opinion by that Court rendered on the same date

(R. 16), which judgment reversed a judgment of the United States District Court for the Northeastern Division of the Eastern District of Tennessee (R. 10), which dismissed the suit of respondent, original plaintiff below. The District Court holding that respondent's suit was barred by the Statute of Limitations.

SUMMARY STATEMENT OF MATTER INVOLVED

Respondent, a resident of the County of Charlotte, State of South Carolina, on April 11th, 1938, qualified in that County as administrator of the estate of Pearl Locklair who died intestate on the 4th day of October, 1937. He also qualified as ancillary administrator of her estate in the County of Sullivan, State of Tennessee, on February 29, 1940.

On March 8th, 1940, respondent, as such administrator, instituted an action at law against the petitioner in the United States Court for the Northeastern Division of the Eastern District of Tennessee, to recover damages for alleged wrongful and negligent acts causing the death of his intestate. The negligent and wrongful acts alleged being the manufacture and distribution by petitioner of a preparation known as "Elixir Sulfanilamide" which, when taken by his intestate, caused her death.

This suit was instituted on March 8th, 1940, two years, five months and four days after the death of respondent's intestate on October 4th, 1937, and one year, ten months and twenty-seven days after respondent first qualified as administrator in South Carolina. The suit was grounded upon Sections 411, 412, 413, and 414, Title 5, Chapter 15, of the Code of Laws of South Carolina for 1932. (R. 5 & 6).

Petitioner entered plea denying negligence as alleged, and averring that if respondent had any cause of action the time within which his suit must be instituted is governed by the laws of Tennessee, the forum State, and that such cause of action, under the Statute of Limitations of the State of Tennessee, must be instituted within twelve months of the date the cause of action arose. (R. 8). In respondent's motion to strike the plea of the Statute of Limitations (R. 9) it was alleged that the period of limitation for instituting action for wrongful death under the laws of South Carolina was six years, "that Tennessee is bound to recognize the six year Statute of Limitations of South Carolina under the full faith and credit clause, Article 4, Section I of the Constitution of the United States. (R. 9)."

On the hearing of this motion, the District Judge entered memorandum opinion, (R. 9 & 10) holding that the Tennessee Statute of Limitations of twelve months controlled; that respondent's action instituted outside of the twelve months period but within the six year period was barred and respondent's suit was dismissed. Judgment was entered accordingly. (R. 10).

Upon appeal by respondent to the Circuit Court of Appeals for the Sixth Circuit that Court, on January 9th, 1942, rendered an opinion (R. 16) holding that the South Carolina Statute of six years was applicable, that respondent's suit was timely instituted, reversed the District Court and remanded the case for trial upon its merits. (R. 14). In holding that the limitation of South Carolina was controlling rather than the limitation of the forum State, the Sixth Circuit based its opinion upon the principle,

> "that where, by statute, a state creates a cause of action for death by wrongful act and prescribes in

> the same statute a limitation period for action, such limitation will be applied in the forum of a sister state, even though the period of limitation for like actions in the latter state is shorter." (R. 22).

It was also found that the Tennessee Courts had announced no opinion to the contrary.

Judgment was accordingly entered reversing and remanding the case. (R. 14).

JURISDICTION

The judgment sought to be reviewed was entered January 9th, 1942.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13th, 1925, 43 Stat. 938, 28 U.S.C. 347(a).

QUESTIONS PRESENTED

1—Where civil suit was instituted in Tennessee for damages for alleged wrongful acts causing death on cause of action arising in the State of South Carolina, does the Statute of Limitations of six years in South Carolina control the time of suit, or does the Tennessee Statute of Limitations of one year for such actions, control?

2—Is the Statute of Limitations of South Carolina, Section 413 of the 1932 Code of that State, prescribing six years for the institution of suit for damages for wrongful acts causing death, such part of the right of action created by the Statute as will cause it to follow the action into a foreign State and control the time for instituting suit in

the foreign State, or is such Statute a time limitation affecting the remedy so that the limitation of the forum State will control?

3—Is respondent's suit instituted March 8th, 1940, two years, five months and four days after his cause of action arose now barred by the Statute of Limitations of twelve months as prescribed by the laws of the State of Tennessee, Tennessee Code Sections 8592, 8595, 8340 and 8246, Appendix 1.

REASONS RELIED ON FOR GRANTING WRIT

1—The judgment and opinion of the Circuit Court of Appeals for the Sixth Circuit in this case is in conflict with the decision of the Circuit Court of Appeals of the Eighth Circuit in the case of Eggen vs. Canadian Northern Railway Company, 255 Fed. 937, Certiorari denied 249, U.S. 594; the decision of the Circuit Court of Appeals of the Seventh Circuit in the case of Hutchings vs. Lamson, 96 Fed. 720; the decision of the Circuit Court of Appeals of the Second Circuit in the case of Platt vs. Wilmot, 118 Fed. 1019, affirmed 193 U.S. 602; the decision of the Circuit Court of Appeals of the First Circuit in the case of Ramsden vs. Knowles, 151 Fed. 721; and the same Circuit in the case of Dexter vs. Edmonds, 89 Fed. 467; and the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of Kansas City Southern Railway Co., vs. Maynor, 209 Fed. 611.

In the case of Eggen vs. Canadian Northern Railway Company, supra, action for personal injuries was instituted in the United States District Court for the District of Minnesota for a cause of action arising in Canada under its Railway Act, Chapter 37, Paragraph 306, which required

suit to be instituted within twelve months. While the Act itself is not copied in the opinion, the Court states that the Canadian Statute, which is invoked, "requires that suits such as this shall be brought within one year." It then holds that such requirement is not a part of the action itself and says, "such character of Statutes have no extraterritorial force. Therefore the Minnesota law, being that of the forum, governs."

It is to be observed, however, that the Minnesota Statute of Limitations was held unconstitutional as violative of Section 2, Article 4 of the National Constitution by reason of the fact that the Minnesota Statute limited its benefits **to citizens of that State alone.**

In the case of Hutchings vs. Lamson, supra, suit was instituted in the United States District Court for the Northern Division of the Northern District of Illionois, to enforce against defendants statutory liability as stockholders in a Kansas Corporation. Under the pleadings, issue was made as to whether the Statute of Limitations of the State of Kansas where the cause of action arose, or the Statute of Limitations of the forum State, Illinois, would control. The Court in holding that the limitation of the forum controlled, said:

> "The contention of the plaintiff in error that the Kansas statute of limitations alone can have any application to the case is manifestly not tenable. The general rule is that in respect to the limitation of actions the law of the forum governs, and while the courts will enforce a limitation established under the law of another state, when applicable, it does not do so to the exclusion of the law of the forum. It would involve serious and possibly absurd consequences, if it were established that a right of action created and governed

by the law of Kansas could be enforced in Illinois after the time when, by the law of the latter state, the action had been barred. The cases cited show that the law of Kansas, if applicable, will be enforced in Illinois, but they do not say nor imply that a like or different limitation by the statute of Illinois may not apply." Hutchings vs. Lamson, supra.

In the case of Kansas City Southern Railway Co., vs. Maynor, supra, suit was instituted in the District Court for the Eastern District of Texas for damages for personal injuries on a cause of action arising in the State of Louisiana. Issue was made as to whether the lex loci or the lex fori would apply. In holding that the limitation of the forum would apply, the Court said:

"The statute of Louisiana, providing that actions for offenses and quasi offenses shall be prescribed by one year (R.C.C. La., art. 3536), affects the remedy primarily; and while it may extinguish the right in Louisiana at the expiration of one year, it is not applicable in the courts of another state, to which the injured party has lawfully removed while the right of action in Louisiana subsisted." Kansas City Southern Ry. Co., vs. Maynor, supra.

2—The Circuit Court of Appeals in this case has decided an important and far reaching question of local law, probably in conflict with applicable local decisions of the Supreme Court of Tennessee. Such holding is in conflict with:

The case of Gassaway vs. Hopkins, et al, 38 Tenn., 583, where the Court held that each State had the right to control the time within which suits may be litigated in its Courts, saying:

"Each State has the right to settle the time within which suits must be brought or may be litigated in its own Courts. Hence, the law of the State where a suit is instituted without regard to where the cause of action originated, governs, as to the defences upon prescription, or limitation of actions."

The case of Barbour vs. Erwin, 82 Tenn., 721, adhering to the same principle, where the Court said:

"The same author says, limitation and prescription are applied only according to the law of the forum. And if a foreigner bring an action for a debt in a State which is barred by its law, although it would not be at home, he is bound by the law of the forum and cannot recover. The reason given is, all States make their laws of peace and have a right to determine for all who resort to their tribunals, how soon after the debt is due the creditor must claim or lose it. The law of the forum must govern on the ground that the whole question of limitation or prescription is one of process and remedy, and not of right or obligation."

The case of Fitzsimmons vs. Johnson, 90 Tenn., 443, where the Court again said:

"In determining the legal **right** of complainant, we apply the law of Ohio—the law of the domicile; and in matters of **remedy** to be enforced here we give force to the law of this State—the law of the forum." (Italics ours).

The case of Hartman vs. Duke, 160 Tenn., 137, where the Court said:

"The law of Tennessee, being the law of the forum, would control only the **practice and pro-**

> **cedure** through which our court enforced the **right given** by the Arkansas statute." (Italics ours.)

In denying to the Tennessee Courts and to Federal Courts sitting in Tennessee, the right to apply the Statute of Limitations of the State of Tennessee, the decision of the Circuit Court of Appeals is in conflict with the well established law of this State.

3—The Circuit Court, in this case, has rendered a decision apparently in conflict with applicable decisions of the United States Supreme Court, the Circuit Court holding that where a limitation is contained in the Statute creating a right that the lex loci will be applied rather than the lex fori. This is in conflict with this Court's holding in the case of Platt vs. Wilmot, 193 U.S. 602. In this case, suit had been instituted in the Northern District of New York to enforce statutory stockholders' liability in a Kansas Corporation. Upon apt pleading, the question arose as to what Statute of Limitation would control, the Court, after considering the situation, held that the law of the forum controlled, saying:

> "It is not the case of a state legislature assuming to regulate foreign corporations, and no such attempt has been made. The substance of the legislation is that when suits are brought in the state of New York to enforce therein the liabilities of directors or stockholders, the statute of limitations enacted by the legislature of that state in regard to directors or stockholders of domestic corporations shall also apply to directors or stockholders of foreign corporations. This is what the legislature has done and this is what it had the right to do.
>
> The Federal courts, sitting in the state, will, in cases brought therein, enforce the state statute

of limitations in actions of this nature." Platt vs. Wilmot, supra.

4—The questions presented are grave questions of public importance involving conflicting decisions between the highest Court of the State and the Federal Court sitting in the State, and is one that should be settled by this Court.

5—The Circuit Court of Appeals has, so far, departed from the accepted and usual course of judicial proceedings and application of Statutes as to call for an exercise of this Court's power of supervision.

Wherefore, it is respectfully submitted that this petition for writ of certiorari should be granted.

S. E. Massengill, doing business as
S. E. Massengill Company, Petitioner.

By Fred H. Parvin, Attorney.

FRANK W. DeFRIECE,
Bristol, Tennessee.

FRED H. PARVIN,
Greeneville, Tennessee.

Attorneys for Petitioner.

APPENDIX I

APPLICABLE SECTIONS OF TENNESSEE CODE OF 1932

SECTION 8592—"All civil actions * * * * * * * * * shall be commenced after the cause of action has accrued, within the periods prescribed in this chapter, unless otherwise expressly provided."

SECTION 8595—"Actions * * * * * * * * for injuries to the person, * * * * * * * * * * within one year after the cause of action accrued."

SECTION 8240—"Where a person's death is caused by the wrongful act, default, or omission of another, and suit is brought for damages, as provided for by sections 8236 to 8237, inclusive, the party suing shall, if entitled to damages, have the right to recover for the mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received. (1883, ch. 186.)"

SECTION 8236—"The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and, in case there is no widow, to his children or to his next of kin, in either case free from the claims of creditors. (1849-50, ch. 58, sec. 1; 1851-52, ch. 17; 1871, ch. 78, sec. 1.)"

IN THE

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OCTOBER TERM, 1941

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SAMUEL EVANS MASSENGILL, Petitioner

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J. T. WILSON, Administrator of the Estate of Pearl Locklair, Deceased, Respondent

---

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The memorandum opinion of the District Judge appears in the Record at pp. 9 and 10. That Court held that the Statute of Limitations of one year prescribed by the Tennessee law was applicable; that respondent's suit was barred by the Statute of Limitations and judgment was accordingly entered dismissing it. (R. 10).

The opinion of the Circuit Court of Appeals is not reported but appears in the Record at pp. 16 to 20, as will be reported 124 Fed. (2d.)—

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on January 9th, 1942. (R. 14).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13th, 1925, 28 U.S.C. 347(a).

It is believed that the following cases sustain the jurisdiction.

Claxon Company vs. Senton Electric Company,
313 U.S. 487.

Griffin vs. McCoach,
313 U.S. 498.

STATEMENT AND QUESTIONS PRESENTED

A concise statement of the matters involved and the questions presented are set out in the petition, and for brevity, will not be here repeated.

SPECIFICATION OF ERRORS

1—The Circuit Court of Appeals erroneously held that where a statutory cause of action is created and in the same Statute a limitation period for action is contained, that such limitation will be applied in the forum of a sister state, even though the period of limitation for like actions in the sister state is shorter, and the action is there barred.

2—The Circuit Court of Appeals erroneously held that in this case respondent's cause of action might be instituted in Tennessee within six years as provided by the South Carolina Statute, and erroneously failed to hold that respondent's time for suit was limited to twelve months as provided by the Tennessee Statute.

3—The Circuit Court of Appeals erroneously concluded that the Supreme Court of Tennessee had not rendered

any decision holding that the Statute of Limitations of the forum State would control causes of action arising in a foreign State.

4—The Circuit Court of Appeals erred in reversing the District Court and in remanding the case for further proceedings.

ARGUMENT

The question to be dealt with, in its essentiality, is whether the Tennessee Statute of Limitation of one year for bringing an action for damages for wrongful acts resulting in death bars an action for alleged wrongful acts causing death in the State of South Carolina. Succinctly stated, does the law of the forum control, or the law of the sister State?

I

THE SOUTH CAROLINA STATUTE IS A LIMITATION ON TIME FOR INSTITUTING SUIT AND IS NOT SUCH A PART OF THE RIGHT AS WILL FOLLOW THE CAUSE OF ACTION TO A FOREIGN STATE TO THE EXCLUSION OF THE LIMITATION OF SUCH STATE GOVERNING THE SAME CAUSE OF ACTION.

Section 413 of Title 5 of Chapter 15 of the Code of Laws for South Carolina for the year 1932, which is applicable provides:

"All such actions must be brought within six years, from the death of such person, etc." It is to be noted that this prescribes a **time for bringing an action on a right created by Section 411, 412.** It does not accord a right **upon condition** that the suit be instituted in such time. Similar language appears in Statutes of various

States and has been held to be a time limitation and not a part of the right. We are aware, of course, that decisions of State Courts are not controlling, but are only persuasive.

We think two cases construing almost identical language are so logical and well considered as to merit citation.

In the case of Brookshire vs. Burkhart, 141 Oklahoma, I, 283, Pac., 571, as reported in 67 A.L.R. 1059, the Court had under consideration the nature of the limitation imposed under the statutory law. Section 824, Oklahoma Comp. Stat. 1921, provides:

> "When death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter if the former might have maintained an action had he lived against the latter for an injury for the same act or omission. **The action must be commenced within two years."** (Italics ours.)

In discussing the proposition of whether the language "the action must be commenced within two years," was a proviso in the statute creating the right so as to govern the existence of the right itself, or was simply an ordinary statute of limitation, the Supreme Court of Oklahoma makes a very thorough analysis of the applicable principles. After doing so, it was held that such language "is a statute of limitation and not in the form of a proviso imposed upon the exercise of the right of action granted." Brookshire vs. Burkhart, supra.

It is to be noted in this case that the language is contained in the same statute creating the right and is almost identical with the language of Section 413 of the South Carolina Code here under consideration.

In the case of Sharrow vs. Inland Lines, 214 New York, 101, L. R.A. 1915E, 1192, the Supreme Court of that State had under consideration the statutory law of New York providing as follows:

> "The executor or administrator . . . of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. **Such an action must be commenced within two years after decedent's death.**" (Italics ours.)

After a very thorough analysis of the case, the Court held that the language "such an action must be commenced within two years after the decedent's death" is a limitation upon the remedy and not upon the right.

Again, it will be noted that the language is almost identical with the language of the South Carolina Limitation Statute.

In the case of Tieffenbrum vs. Flannery, 198 N.C. 397, the Supreme Court of North Carolina, in speaking of limitation statutes, states, "all Statutes of Limitations are essentially time clocks."

Statutes of Limitation are looked upon with favor and are not to be given strained construction so as to defeat their purpose. Pillow vs. Roberts, 54 U.S. 472; U.S. vs. Wilder, 80 U.S. 254.

This Court, early, has considered the nature of the Statute of Limitations.

In the case of M'ElMoyle vs. Cohen, 13 Peters, 327, this Court, considering the effect to be given the rights arising under the laws of other States when sought to be enforced in our State, and whether the limitation of the forum, or the limitation of the foreign State would control, has said:

> "Is it a plea that settles the right of a party on a contract or judgment, or one that bars the remedy? **What diversity of opinion there may be among jurists upon this point, we think it well settled to be a plea to the remedy**; and, consequently, that the lex fori must prevail. (Higgins vs. Scott, 2 Barn. & Adol, 413; Cowen R. 528, note 10; Id., 530; Van Ramsdyk v. Kane, 1 Gillis R. 371; LeRoy vs. Crowninshield, 2 Mason R. 351; British Linen Co. v. Drummond, 10 Barn & Cress, 903; De La Vega vs. Veanna 1 Barn & Adol. 284; De Couch vs. Savalier, 3 Johns, Ch. R. 190; Lincoln vs. Battalle, 6 Wend. R. 475; Gulick vs. Lodes, Green's New Jersey Rep. 68; 3 Burge's Com. on Col. and For. Laws, 883). The statute of Georgia is 'that actions of debt on judgments obtained must be brought within five years after the judgment obtained.' It would be strange, if in the now well understood rights of nations to organize their judicial tribunals according to their notions of policy, it should be conceded to them in every other respect than that of prescribing the time within which suits shall be litigated in their courts." (Italics ours.)

Again, in the case of Great Western Telegraph Company vs. Purdy, 162 U.S. 339, this Court specifically holds that the Statute of Limitation is controlled by the laws of the forum wherein it was said:

> "The limitation of actions is governed by the lex fori, and is controlled by the legislation of

> the state in which action is brought, as construed by the highest court of that state, **even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions.**" M'El-Moyle vs. Cohen, 38 U.S. 13 Pet. 312; (10; 177); Hauserman vs. Blunt, 147 U.S. 647 (37:316); Metcalf vs. Eatertown, 153 U.S. 671 (38: 862); Balkam vs. Woodstock Iron Co. 154 U.S. 177 (38: 853). "Neither the statutes nor the decisions of the state of Iowa upon this subject have made any discrimination against the citizens, the contracts, or the judgment of other states, or against any right asserted under the Constitution or laws of the United States." (Italics ours.)

In the case of Rosenzweig vs. Heller, 302 Pa., 279, the Supreme Court of that State very pertinently held,

> "The right is not gone until it is lost under the law creating it, but the Statute of the forum shows the local policy as to the time in which such actions are to be brought."

In the case of Hutchings vs. Lamson, supra, dealing with the same subject, it is stated:

> "It would involve serious and possibly absurd consequences if it were established that a right of action created and governed by the law of Kansas could be enforced in Illinois after the time when by the law of the latter State the action had been barred."

In Wharton's Conflict of Laws, 3rd Ed., Vol. 2, at page 1264, a clear statement is contained.

> "Assuming, however, that the time allowed by the foreign statute creating the cause of action has not expired, the plaintiff comes to the bar of the forum with a concededly existing cause of

> action; but it is not apparent why an action thereon does not, as in the case of an existing cause of action at common law, fall within the operation of the general principle that the limitation of actions is goverened by the law of the forum."

The principle is well summarized in Goodrich on Conflict of Laws, Par. 86, p. 171, wherein it is said:

> "Suit on a cause of action created by a statute thus limiting the right must, then, be brought within the time fixed by the law creating the claim. Suppose, however, that the lex fori created a cause of action under similar circumstances, but provides a shorter limitation period. It would seem that the plaintiff could not recover if his action was not within the limitation period set by the lex fori also. The right is not gone until it is lost under the law creating it. But the statute of the forum shows the local policy as to the time in which such actions are to be brought."

We earnestly insist that the South Carolina Statute is merely a time clock prescribing the period within which a litigant who has a right created under Sections 411 and 412 shall move to assert his rights; that it effects the remedy and is, in no way, a part of the right created. That the Legislative body of Tennessee may prescribe the time within which a resident of a sister State having a cause of action arising under the laws of the sister State may assert such rights in the Court of its own State; that by so doing, it, in no way, detracts from the right, but merely governs the time of its assertion.

Indeed, the Supreme Court of South Carolina, itself, holds that the law of the forum on a cause of action in a sister State will control. Sawyer vs. Macauley, 18 South

Carolina, 543. While this case does not involve a wrongful death Statute, it does announce the policy of the Courts of that State.

Such principle has been definitely adhered to in numerous decisions. In the case of Tieffenbrum vs. Flannery, 198 N.C. 397, the Supreme Court of that State was considering a cause of action for wrongful death occurring in Florida. The suit was instituted in North Carolina. The Florida Statute allowed two years for bringing suit. The North Carolina Statute allowed only one year. Upon consideration, the Court held that the limitation of the forum would control, saying:

> "It is a general rule declared in the text books and in decisions of appellate courts that statutes of limitations, being procedural in nature and working upon the remedy, govern the cause of action in the particular forum in which such cause of action is asserted. In other words, the statute of limitations of the place of trial, or lex fori, governs the action. *
>
> All statutes of limitations are essentially time clocks, and while Consol. Stat. Par. 160, has been construed as a condition annexed to the cause of **action**, it is also a time **limit to the procedure.** At all events, it is a legislative declaration of the policy of this state, providing in express and mandatory language that no action for wrongful death shall be asserted in the courts of this state after the expiration of one year from the time of death. Certainly, it is not to be supposed that the legislative department intended to confer upon non-residents more extensive rights in the courts than accorded to citizens of this state."

To the same effect see Rosenzweig vs. Heller, supra; White vs. Govatos, 10 Atl. (2d.) 524; Minor Conflict of

Laws, Section 10; Restatement of the Law, Conflict of Laws (American Law Institute), Section 433.

In the case of Sylvia Cauley vs. S. E. Massengill Company, 35 Fed., Supp., 371, the District Court had before it the applicability of the Statute of Limitations of the State of Florida. Florida's limitation was two years, and the Tennessee limitation, of course, one year. The suit was within the two years, but outside the one year period. In holding that the limitation of the forum controlled the action, the Court there said:

> "I cannot accept the reasoning in the cases which decide that the lex loci, which creates a right not known to the common law, and conditions the right upon its exercise within a period longer than that granted by the lex fori, couples the period of limitation with the right created by the statute so as to make the lex loci, applicable in states which fix a shorter period of limitation for the same cause of action."

II

IT IS ELEMENTARY THAT A FEDERAL DISTRICT COURT, IN THE ABSENCE OF A CONTROLLING FEDERAL STATUTE, SHOULD APPLY THE STATUTE OF LIMITATION OF THE LOCAL STATE.

> Griffin vs. McCoach, 313 U.S. 498; Campbell vs. Haverhill, 155 U.S. 610; Klaxon Company vs. Stenton Electric Mfg., 313 U.S. 450.

III

THE JUDGMENT AND OPINION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE IS IN CONFLICT WITH THE DECISIONS OF THE CIRCUIT COURT OF APPEALS OF THE EIGHTH CIRCUIT; OF THE CIRCUIT COURT OF APPEALS OF THE SEVENTH CIR-

CUIT; OF THE CIRCUIT COURT OF APPEALS OF THE SECOND CIRCUIT; OF THE CIRCUIT COURT OF APPEALS OF THE FIRST CIRCUIT, AND OF THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The cases which we deem are conflicting with the holding of the Circuit Court in this case have been set out and discussed in the petition, and, for brevity, will not be here repeated.

We think the Court fell into error in assuming that the South Carolina Statute of Limitation, Section 413, supra, constituted a part of the right created under the laws of South Carolina, and, consequently, that it must be given effect in the Court of sister States.

The Court relied heavily upon the case of Theroux vs. Great Northern Railway Co., 64 Fed. 84 (C.C.A. 12, p. 52). In fact, it is said by the Court in its opinion:

> "In a case decided today, Nick Maki v. George R. Cooke Company, ... F. (2d)—(C.C.A. 6), this court approved, applied and extended the doctrine of Theroux v. Great Northern Railway Co., 64 Fed. 84 (C.C.A. 8), that where, by statute, a state creates a cause of action for death by wrongful act and prescribes in the same statute a limitation period for action, such limitation will be applied in the forum of a sister state, even though the period of limitation for like actions in the latter state is shorter. We apply that principle here." R. 23.

In the Maki vs. George R. Cooke Co., case, 124 Fed. (2d.) 633, referred to by the Court as controlling in the present case, the Court had given force to a six year Statute of Limitations of the State of Minnesota applicable to all statutory causes of action arising in that State. It

was held that such six year Statute would be carried into the State of Michigan and there given force to the exclusion of the three year Statute of the State of Michigan in an action for damages arising in Minnesota, which suit was instituted within the six years but beyond the three year period.

These decisions of the Sixth Circuit, considered as a whole, apparently, are to the effect that a time limitation contained in a statutory cause of action of a sister State is to be given force in the forum State to the exclusion of a time limitation in the forum State. This would seem to be in conflict with the holding of this Court in cases heretofore cited to the effect that States may, by Statute, regulate the time within which litigants of foreign States may prosecute their cause of action in the forum States.

The conflict of the Theroux case with the decisions of other Circuit Courts has been heretofore pointed out. The Theroux case was instituted in Minnesota having a two year Statute of Limitations, on a cause of action arising in Montana having a three year Statute. The action was commenced within the three year, but outside the two year period. The Minnesota Statute, the forum State, **applied only to causes of action arising in Minnesota.** The Court, itself, pointed this out by saying:

> "Moreover, it cannot be said that, by entertaining the suit after the lapse of two years, the laws of Minnesota would be set at naught, or any well-defined public policy of that state violated; for, in contemplation of law, the two year limitation prescribed by the statute of that state (chapter 77, Par. 2, supra) was only intended to apply, and can only apply, to causes of action which originate in that state, and not to causes of action that originate elsewhere."

It is true that the Court holds that the limitation is a part of the right and follows the action to the forum State. This, however, was in the nature of **dicta,** as the case could have been decided upon the proposition that the Minnesota Statute was confined to the limits of its own State.

The Theroux case was grounded upon certain other cases. An examination of the cases cited as authority show only that the limitation contained in a statute creating the right limited the right. Each of those cases, so far as examined by us, show that the defense was made in the forum State, that the plaintiff had no cause of action in the sister State **because of the expiration of the time limitation in the statute creating the right.** The Theroux case, for the first time, undertakes to extend these decisions so as to carry the limitation into the forum State and to have it **supplant the limitation of the forum State.** This is disclosed by examination of the cases cited, some of which are: The Harrisburg, 119 U.S. 199, where suit for damages for wrongful death upon the high seas, more than one year after the cause of action occurred in Massachusetts, was instituted in Pennsylvania. Both States limited the time to one year, and the Court properly held the action barred; Munos vs. Southern Pacific Co., 51 Fed. 188, was an action for damages for wrongful death in the territory of New Mexico having a limitation of one year, the suit being instituted in Texas, likewise having a limitation of one year, the action being brought almost three years after the death. The Court properly held the action barred. It is to be noted that this decision was based upon the limitation of the forum State; Boyd vs. Clark, 8 Fed. 849, was an action for death occurring in the province of Ontario, which had a limitation of one year,

and the suit was instituted in Michigan more than one year afterwards, but apparently within the time allowed by the forum State. The limitation plea was defensive, and the Court held that plaintiff did not come to Michigan with a cause of action; that it was barred under the limitation of Ontario, saying: "such limitation is operative in any other jurisdiction wherein the plaintiff may sue."

The State decisions referred to in the Theroux case are not analysized, but as far as examined, adhere to the same principle. **It is to be noted that in each of the cases relied upon in the Theroux case, plaintiff's cause of action had expired by the limitation laws of his own State before he instituted suit in the forum State.**

The learned Circuit Court of Appeals in the Maki case, supra, refers to Engel vs. Davenport, 271 U.S. 33, where an action was instituted in California to recover damages for personal injuries, the action being grounded under the Merchant Marine Act, and was instituted more than one year, but within the two years. California's limitation for such action was one year. The Merchant Marine Act, as construed by the Supreme Court, allowed such suits within two years. The Court held that the limitation in the Merchant Marine Act was part of the right and would be applied in the Courts of any State where suit was instituted, saying, "as a provision affecting the substantive right created by Congress in the exercise of its paramount authority in reference to the maritime law, it must control an action brought in a State Court under the Merchant Marine Act, regardless of any Statute of Limitations of the State." This was all the Supreme Court held, or intended to hold in such case. It is emphasized by the Circuit Court of Appeals for the Sixth Circuit in the case

of Louisville & N.R. Railroad Co., vs. Cory, 54 Fed. (2d.) 8, wherein the Court said:

> "Just as a state may not fix a shorter period of limitation than that prescribed by Congress within the domain of its exclusive authority (Engel v. Davenport, 271 U.S. 33, 46 S. Ct. 410, 70 L. Ed. 813), so no State may fix a longer period than that prescribed by Congress. Compare, also, Arnson v. Murphy, 109 U.S. 238, 243, 3 S. Ct., 184, 27 L. Ed. 920."

It also cites the case of Davis vs. Mills, 194 U.S. 451. In that case the Court said:

> The Courts have been willing to treat the limitations of time as standing like other limitations, **and cutting down the defendant's liability wherever he is sued."** (Italics ours.)

The case of Keep vs. National Tube Co., 154 Fed. 121, was instituted in New Jersey on a cause of action arising in Minnesota. The Court gave force to the limitation of Minnesota rather than the forum State for the reason that the New Jersey limitation statute applied only to causes of action in New Jersey and not to causes of action arising in other States.

A study of the several cases, we think, shows that confusion exists among the Courts of the several Circuits to such an extent that the holding of the Sixth Circuit in the present case should be reviewed by this Court and a true principle announced.

The true rule, we think, is stated in Restatement of the Law, Conflict of Laws (American Law Institute) Section 433, where it is said:

> "A limitation of time for bringing suit contained in the death Statute of the place of

wrong is binding in every State and no State will allow recovery on Statutes **after the time has elapsed."** (Italics ours.)

Again, stated in the same text, Section 605,

"If by the law of the State which has created a right of action, it is made a condition of the right that it shall expire after a certain period of limitation has elapsed, **no action begun after the period has elapsed can be maintained in any State."** (Italics ours.)

The limitation laws of the State creating the action giving a longer time than the limitation laws of the forum State should not be carried into the forum State and supersede and exclude the application of the forum laws. The litigant should come to the forum State with a live cause of action under the laws of his State, and must proceed in the forum State within the time accorded him by the laws of the forum State.

IV

THE DECISION OF THE CIRCUIT COURT OF APPEALS INVOLVES IMPORTANT QUESTIONS OF LOCAL LAW, AND IS IN CONFLICT WITH THE APPLICABLE LOCAL DECISIONS OF THE SUPREME COURT OF TENNESSEE.

The cases of Gassaway, et al, vs. Hopkins, et al, 38 Tenn., 533; Barbour vs. Erwin, 82 Tenn., 721; Fitzsimmons vs. Johnson, 90 Tenn., 443, and Hartman vs. Duke, 160 Tenn., 137, have been heretofore cited in the petition and are in conflict with the holding of the Circuit Court of Appeals. These cases definitely announce the policy of the Courts of Tennessee on causes of action originating in

sister States. It is very aptly stated in Gassaway vs. Hopkins, supra,

> "Each State has the right to settle the time within which suits must be brought or may be litigated in its own Courts. Hence, the law of the State where a suit is instituted, without regard of where the cause of action originated, governs, as to the defences upon prescription, or limitation of actions."

If a limitation under the laws of the sister State giving a longer period for instituting suit than does the law of Tennessee on the same cause of action, was given effect, then **the rights of citizens of Tennessee would be invaded.**

It is said by the learned Court of Appeals that the question was pretermitted in the case of Parsons vs. American Trust & Banking Co., 168 Tenn., 49. The Court gave effect to the one year Statute of Tennessee, however, saying:

> "In our opinion, the action was brought within one year from the date the cause of action accrued." Parsons vs. American Trust & Banking Co., supra, 58.

Since the action was instituted within the time required by the forum State, as well as the time required by the sister State, there was no occasion for passing upon the question.

The Tennessee Statute of Limitations, Section 8595, Appendix I to the petition, requires suits for injuries to the person to be instituted within one year after the cause of action accrued, and is contained in a controlling clause of the Code prescribing limitation for civil actions. Code Section 8592, Appendix 1 to petition.

The Statute of Tennessee giving the right to recover damages for wrongful acts causing death is Section 8240 of the Tennessee Code, and the survival of action is provided for in Section 8236 of the Tennessee Code, Appendix 1 to petition.

Our Supreme Court holds that the limitation of twelve months applies to actions grounded on negligence where death was instantaneous. In the case of Fowlkes vs. Railroad Co., 64 Tenn., 663 (667), where argument to the contrary was made, the Court said:

> "This argument, though plausible, is not sound. As we have seen, the statute is equally applicable to cases where the injured party lives a time, and to cases where death is instantaneous."

The same principle is adhered to by later decisions of the forum Court. Trafford vs. Adams Express Co., 76 Tenn., 107; Whaley vs. Catlett, 103 Tenn., 355; Whitson, Admr., vs. T. C. Ry. Co., 163 Tenn., 38. In the latter case, in an action for wrongful death, the Court said:

> "The right of action is subject to the Statute of Limitations of one year." Whitson vs. Railway Co., supra.

While the learned Court of Appeals observes that certain differences exist in the South Carolina Statute and the Tennessee Statute, the causes of action are essentially the same. The fact that the Tennessee action is referred to by the Courts as a survival action would seem to be of no importance.

A comparison of the Statutes of Tennessee with those of South Carolina controlling the nature of the action discloses that they are very similar.

In the Tennessee Statute, it is provided:—

"The right of action which a person who dies from injury received from another, or whose death is caused by the **wrongful act, omission, or killing by another** would have had against the wrongdoer in case death had not ensued, etc., * * *." (Italics ours.) Tennessee Code, Section 8236.

The South Carolina Statute provides:—

"Whenever the death of a person shall be caused by the **wrongful act, neglect** or **default of another,** and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, etc., * * * * * * *." (South Carolina Code, Section 411,) (Italics ours.)

It will be observed that the cause of action given by such Statutes is for the **wrongful act** resulting in death. The death of the injured person itself, is not what gives rise to the right to maintain the action, but in both cases, it is the wrongful act, neglect, default or misconduct of the wrongdoer inflicting the injury causing death.

The Supreme Court of this State has said:—

"The foundation of the action is a wrongful act, resulting in the death of another." Parsons vs. American Trust & Banking Co., supra, 53.

In Tennessee, the action may be instituted by the personal representative of the deceased, or by the widow in her own name. Tennessee Code, Section 8237.

In South Carolina, the suit may be brought in the name of the Executor or Administrator for the use and benefit of the husband, child, or children, etc., South Carolina Code, Section 412.

In Tennessee, damages for the personal injury to the deceased, if any, and damages to the widow, children or next of kin resulting from the death, are recoverable in one action.

In South Carolina, such damages are recoverable in two separate suits—the one for personal injury to the deceased, and the other for damages caused by the wrongful act resulting in death.

In each case, however, the same measures of damages applies. Tennessee Code, Section 8240; South Carolina Code, Section 412.

Under both Statutes, damages resulting from a wrongful act causing death are recoverable. The substance is the same, and whether it be referred to as a survival statute, or a wrongful death statute, would seem to be immaterial.

The State of Florida has a death Statute, and in the case of Parsons vs. American Trust & Banking Co., supra, our Supreme Court very pertinently remarked:

> "The Courts in this State have consistently adhered to the principle that the law of the place where a wrong is committed must determine the rights of the parties affected by such wrong.*****
> * * * * * * * * * *
> The law of Florida, giving the widow the right to demand compensatory damages for such wrongful act, is in strict accord with the law of Tennessee."

V

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS, APPARENTLY, IN CONFLICT WITH THE DECISIONS OF THIS COURT.

The apparent conflict is pointed out in the petition. The case of Platt vs. Wilmot, 193 U.S. 602, is applicable.

VI

THE CIRCUIT COURT OF APPEALS HAS SO DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND APPLICATION OF STATUTES AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The conflict and confusion existing in the decisions of the Courts of the several Circuits, the Courts of the different States, and the District Courts, has been heretofore pointed out. The decision in the present case only serves to accentuate the conflict and confusion. This Court, by granting the certiorari, can determine whether the law of the forum State or the law of the sister State will control under the factual situation here presented.

We submit that where the Statute of the sister State creating a cause of action also contains a Statute limiting the time for exercising the right, that such period of limitation will not be carried into the forum State where a Statute of that State limits the time for instituting such suit to a shorter period so as to supplant and exclude the application of the limitation of the forum State.

It is therefore respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

FRANK W. DEFRIECE
Bristol, Tennessee

FRED H. PARVIN
Greeneville, Tennessee

Attorneys for Petitioner.

(6)

No. 1093.

MAY 1 1942

IN THE

Supreme Court of the United States

October Term, 1941

SAMUEL EVANS MASSENGILL,

Petitioner,

vs.

J. T. WILSON, Administrator of the Estate of Pearl Lockhart, deceased,

Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Joseph K. Brown,
J. C. Long,
Benjamin S. Gore,
Charles M. Gore,
Attorneys for Respondent,
J. T. Wilson, Administrator of the Estate of Pearl Lockhart, Deceased.

Of Counsel:
J. C. Long,
Gore & Gore.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1941.

SAMUEL EVANS MASSENGILL,

Petitioner,

vs.

J. T. WILSON, Administrator of the Estate of Pearl Locklair, deceased,

Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

This action was originally brought by Respondent in the District Court of the United States for the Eastern District of Tennessee, for wrongful death occurring in South Carolina, caused by Petitioner's gross negligence in manufacturing and widely distributing for sale to the public without adequate preliminary tests, and without proper warning labels, a deadly poison known as Elixir Sulfanilamide. Jurisdiction was obtained under diversity of citizenship, Petitioner being a citizen and resident of Bristol, Tennessee, Respondent a resident of South Carolina, and the amount involved being more than $3,000.00.

As alleged in the declaration, Pearl Locklair, a resident of Charleston, South Carolina, whose death is the subject of

this action, contracted a sore throat and under a doctor's prescription began taking this Elixir Sulfanilamide on September 24, 1937, and on October 4, 1937, as a result thereof, died in a hospital in Charleston, South Carolina. The Respondent, J. T. Wilson, also a resident of Charleston, South Carolina, after qualifying as Administrator of her estate in South Carolina, and as Ancillary Administrator in Tennessee, brought this suit on March 9, 1940, under the South Carolina death statutes, Sections 411, 412 and 413 of Title 5, Chapter 15, Code of Laws for the State of South Carolina for the year 1932. These statutes were enacted into law at the same time and in the same act, and were in effect at the time this cause of action arose. (Record page 8, Section 3). The Petitioner filed a plea relying upon Section 8595 of Williams Tennessee Code Annotated which provides a one year limitation from the date of the injury for personal injury actions. Respondent filed a motion to strike this plea, contending that Section 413 of the South Carolina Code of 1932 (which provides a six year limitation from the date of death for actions arising under said Section 411 of the South Carolina Code) controls, rather than said Tennessee Code Section 8595. (Record page 8).

The District Court overruled this motion to strike, sustained Petitioner's plea of the statute of limitations, and dismissed the case, on the ground that the causes of action created by Section 411 of the South Carolina Code and Section 8236 of Williams Tennessee Code Anno. were the same, and that Section 8595 of Williams Tennessee Code Anno. was a specific limitation on causes of action for death in Tennessee, and was therefore applicable to causes of action arising in South Carolina under Section 411 of the South Carolina Code. (See Opinion Record pages 9 and 10).

On appeal from this decision to the United States Circuit Court of Appeals for the Sixth Circuit, the Circuit Court re-

versed the holding of the District Court and remanded the case for trial on its merits, holding (1) that the causes of action created by Section 411 of the South Carolina Code and Section 8236 of Williams Tennessee Code Anno. were entirely different, the former being a new and separate cause of action for death in the deceased's beneficiaries, the latter being a cause of action for personal injuries in the deceased which survives his death for the benefit of designated beneficiaries: (2) "Where, by statute, a state creates a cause of action for death by wrongful acts and prescribes in the same statute a limitation period for action, such limitation will be applied in the forum of a sister state, even though the period of limitation for like actions in the latter state is shorter"; and (3) that the Tennessee Supreme Court has never passed upon the question of whether the limitation statute Section 8595 of Williams Tennessee Code Anno. applies to a foreign death statute. (See Record page 14 et seq.).

From the action of the Circuit Court of Appeals Petitioner has made application to this Court for Writ of Certiorari.

STATUTES INVOLVED.

a. South Carolina Statutes.

Section 411. "Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person or corporation who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused

under such circumstances as make the killing in law a felony."

Section 412. "Every such action shall be for the benefit of the wife or husband and child, or children, of the person whose death shall have been so caused; and if there be no such wife, or husband, or child, or children, then for the benefit of the parent or parents; and if there be none such, then for the benefit of the heirs at law of the distributees of the person whose death shall have been caused, and shall be brought by or in the name of the executor or administrator of such person; and in every such action the jury may give such damages, including exemplary damages where such wrongful act, neglect or default was the result of recklessness, wilfulness, or malice, as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought. And the amount so recovered shall be divided among the before mentioned parties, in such shares as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate."

Section 413. "All such actions must be brought within six years from the death of such person, and the executor or administrator, plaintiff in the action, shall be liable to costs in case there be a verdict for the defendant, or non-suit or discontinuance, out of the goods, chattels, and lands of the testator or intestate, if any."

b. Tennessee Statutes.

Section 8236 of William's Tennessee Code Anno. (1934), does not create a new cause of action in the beneficiaries based upon the death of their deceased, but simply preserves the injured party's right of action for personal injuries

which would otherwise be extinguished by his death. Section 8236 is as follows:

> "Right of action for wrongful injuries resulting in death or for wrongful killing does not abate, but passes to whom.—The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission or killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and, in case there is no widow, to his children or to his next of kin; or to his personal representative, for the benefit of his widow or next of kin, in either case free from the claims of creditors. (1849-50, ch. 58, sec. 1; 1851-52, ch. 17; 1871, ch. 78 sec. 1.)"

Tennessee, however, has no specific statute of limitations under legislative enactment which applies directly to death cases arising either in Tennessee under Section 8236, or in a foreign state. In the absence of such a statute the Supreme Court of the State of Tennessee, in the case of *H. P. Fowlkes* v. *N. & D. R. R. Co.* (1872) 65 Tenn. (9 Heisk.) 829, has held that Section 8595 of William's Tennessee Code Anno. (1934), which set a limitation of one year on causes of action for personal injuries, is also applicable to the Tennessee Code Section 8236 under which the cause of action of the deceased for personal injuries survives his death. Section 8595 is as follows:

> "One year for libel, personal injuries, etc.—Actions for libel, for injuries to the person, false imprisonments, malicious prosecution, criminal conversation, seduction, breach of marriage promise, and statutory penalties, within one year after cause of action accrued."

The limitation of one year for personal injuries is made applicable to Section 8236 of the Tennessee Code under the case of *H. P. Fowlkes, Admr.* v. *N. & D. R. R. Co., supra,* because the cause of action which accrues is one for personal injury in the deceased, and is simply preserved by Section 8236 for certain designated beneficiaries upon his death. Consequently the limitation of one year runs from the date the cause of action accrues in favor of the deceased, namely, the date he was injured.

The Supreme Court of Tennessee has never passed upon the question of whether this personal injury limitation in Tennessee would apply to a cause of action for wrongful death arising in a foreign state under a statute which creates a new cause of action in the beneficiaries of the deceased, and that comes into existence and accrues to them only upon the death of the deceased, rather than a statute like the Tennessee Code Section 8236, which preserves the right of action the deceased had for personal injuries for the benefit of certain beneficiaries. See the case of *Parsons* v. *American Trust and Banking Company,* 168 Tenn. 49, 73 S. W. (2d) 698. (See Opinion Circuit Court of Appeals Record p. 19). Nor has the Supreme Court passed upon the question of whether the Tennessee Code Section 8595 applies to a foreign death statute of any nature. Neither have counsel for Petitioner in their brief pointed out any case where the Supreme Court of Tennessee has directly passed upon this question.

Tennessee also has a general statute of limitation governing all cases not expressly provided for, namely, Section 8601, which is as follows:

> "Actions against guardians, executors, administrators, sheriffs, clerks, and other public officers on their bonds, actions on judgments and decrees of courts of record of this or any other state or gov-

ernment, *and all other cases* not expressly provided for, shall be commenced within ten years after the cause of action accrued." (Italics ours).

QUESTIONS PRESENTED.

I.

Does the petition for writ of certiorari set forth any proper reason for granting the writ as required by Rule 38 (5) (b) of this Court?

II.

Does the Tennessee limitation of one year for personal injury actions (Sec. 8595) control the time within which action for death caused by wrongful act in South Carolina must be brought in Tennessee under the applicable South Carolina statutes, Sections 411, 412 and 413 of Title 5, Chapter 15, Code of 1932?

More particularly this main question is composed of two parts, decision upon either one of which would determine whether Section 8595 of William's Tennessee Code Anno. (1934) controls the bringing of this action in Tennessee.

These questions are as follows:

1. Whether the South Carolina specific limitation (Sec. 413) of six years for death action arising in South Carolina under Section 411 of the South Carolina Code controls as a matter of right the time within which action can be brought in Tennessee under South Carolina Code Section 411.

2. If some Tennessee statute of limitation must control the action at bar prosecuted under South Carolina Code Section 411, which Tennessee limitation is applicable to the cause of action created in Section 411 of South Carolina Code, Section 8595 or Section 8601 of William's Tennessee Code Anno. (1934)?

SUMMARY OF ARGUMENT

I.

The petition for writ of certiorari is insufficient because it does not set forth any proper reason for the allowance of the writ as required by Rule 38 (5) (b) of this Court.

II.

There is no error in the action of the Circuit Court of Appeals in setting aside the judgment of the District Court and remanding the case for trial on its merits, because,

A. Section 413 of the South Carolina Code of 1932, providing a limitation of six years for actions brought under Section 411 of the South Carolina Code, is a specific limitation set up at the time the new cause of action was created; is a matter of *right* and not a matter of *remedy*, and, therefore, goes with the cause of action created by Section 411 as a matter of right wherever it is sued upon, and is controlling when sued upon in Tennessee,

B. 1. Section 8595 of William's Tennessee Code Anno. is not applicable to the cause of action for death created in Section 411 of the South Carolina Code.

2. If some Tennessee limitation must apply to Section 411 of the South Carolina Code, Section 8601 of William's Tennessee Code Anno. is the applicable statute.

ARGUMENT.

I.

The Petition for Writ of Certiorari is Insufficient Because it Does Not Set Forth Any Proper Reason For Allowance of The Writ as Required by Rule 38 (5) (b) of This Court.

A. The Circuit Court of Appeals for the Sixth Circuit has not rendered a decision in conflict with another Circuit Court of Appeals.

Of the six Circuit Court of Appeals decisions cited by Petitioner as conflicting with the decision of the Circut Court of Appeals in the case at bar, we submit none is even in point, much less conflicting.

1. *Eggens* v. *Canadian Northern Ry. Co.*, 255 Fed. 397, certiorari *granted* 249 U. S. 594, 63 L. Ed. 793, reversed, 252 U. S. 551, 64 L. Ed. 713.—

This case was based upon personal injury and not death, the main question being, whether the Minnesota statute, providing that a cause of action arising in a foreign state and barred by the limitation of the foreign state cannot be sued upon in Minnesota, is repugnant to Article 4 Sec. 2 of the Constitution of the United States.

Tennessee has a similar statute preventing prosecution of actions in Tennessee which are barred in the state where they arose, and the United States Supreme Court settled the constitutionality of such statutes in the case of *Eggens* v. *Canadian Northern Ry. Co., supra.* We submit, however, that this question is not at issue in the case at bar.

Four of the other five Circuit Court of Appeals cases cited by the Petitioner are cases arising out of a statute of the *State* of *Kansas* imposing certain liabilities upon stock holders under specified conditions, but no specific limitation

upon the time for asserting such rights under the statute was set up in Kansas, the applicable Kansas limitation being a general one:

2. *Hutchins* v. *Lamson* (1899) 37 C. C. A. 564, 96 Fed. 720 (certiorari denied in 1903) 189 U. S. 514, 47 L. Ed. 924, 23 Sup. Ct. Ry. 853.—The direct holding of the court in this case was based on procedural grounds. However, the *dicta* upon which Petitioner relies has no bearing upon the case at bar, for the reason that the Kansas limitation in question was a general one and not one specifically relative to the substantive right sued on.

3. *Platt* v. *Wilmot*—118 Fed. 1019, 193 U. S. 602, 48 L. Ed. 809.—No question was raised in this case as to which limitation should apply, since the Kansas and New York limitations were both for three years.—

However, see note to this case p. 809 L. Ed. Vol. 48, in which it appears that the Kansas limitation applicable to the right sued upon was a *general one* applicable to all contracts not in writing, and to all liabilities created by statute other than a forfeiture or penalty.

4. *Ramsden* v. *Knowler*—(1907)—151 Fed. 721.—The court in this case held,

"The exceptional rule that, where a statutory right is given subject to a special limitation, such limitation inheres in the right and follows it into another jurisdiction where it is sought to be enforced to the exclusion of the statute of limitations of the forum, cannot be extended to make the *general statute* of limitations of the state where the liability arose operate extraterritorially."

We fail to see in what manner this holding is in conflict with the decision of the Circuit Court of Appeals in the case at bar, since the South Carolina limitation was a specific one.

5. *Dexter* v. *Edmonds*—(1898)—89 Fed. 467—see top of page 473, where the court points out that the Kansas limitation involved is a *general one* and therefore not operative in a foreign state.

6. *Kansas City Southern Ry. Co.* v. *Maynor* (1913) (C. C. A. 5th Cir.) 209 Fed. 611.

This case involved an action for personal injury which arose in Louisiana and was sued upon in Texas. The Court held that the Louisiana limitation of one year was not applicable in Texas, "to which state the injured party had lawfully removed while the right of action in Louisiana subsisted."

We submit that this decision of the United State Circuit Court of Appeals for the Fifth Circuit is not in conflict with the Circuit Court of Appeals' decision in the case at bar, for the reason that the decision of the Fifth Circuit involved a common law action for *personal injury.*

On the other hand all of the United States Circuit Courts of Appeals which have passed upon this question are in agreement that where, by statute, a state creates a new cause of action either in tort or contract which did not exist at common law and prescribes a specific limitation period for the action either in the same act, or in a different act specifically relative thereto, such limitation will be applied in the forum of a sister state, even though the period of limitation for like actions in the forum state is shorter.

Thereaux v. *Northern Pacific Ry. Co.* 64 Fed. 84
Keep v. *National Tube Co.* 154 Fed. 121
Brunswick Terminal Co. v. *National Bank of Baltimore* 99 Fed. 635.
See also: *Davis* v. *Mills* 194 U. S. 451, 48 L. Ed. 1067.

B. The Circuit Court of Appeals has not decided an important question of local law in conflict with applicable local decisions.—

We submit that the Supreme Court of Tennessee has not passed upon the question at issue here, as will be seen by a reading of *Parsons* v. *American Trust and Banking Co.*, 168 Tenn. 49, 58, S. W. (2d) 698. (See Record p. 19, Opinion Circuit Court of Appeals).

Three of the four Tennessee cases which Petitioner cites as being in conflict with the holding of the Circuit Court in the case at bar, namely *Gassaway* v. *Hopkins*, 38 Tenn. 583, *Barbour* v. *Erwin*, 82 Tenn. 721, and *Fitzsimmons* v. *Johnson*, 90 Tenn. 443 are not death cases, and involve the application of forum limitations to common law actions.

The Fourth case, *Hartman* v. *Duke*, 160 Tenn. 137, is a death case, but the main question at issue there was what law should govern the distribution of recoverable damages in a death case, the law of the state where the accident occurred or the law of the forum. The question of what limitation should apply was not at issue.—

C. The Circuit Court of Appeals, in this case, has not rendered a decision in conflict with applicable decisions of the United States Supreme Court.—

The one United States Supreme Court case cited by petitioner, *Platt* v. *Wilmot, supra,* is, we submit, not in conflict with the decision of the Circuit Court of Appeals, as we have heretofore pointed out, and we have been unable to find any reported decisions of the Supreme Court of the United States in conflict with the holding of the United States Circuit Court of Appeals in the case at bar.

On the other hand, at least one Supreme Court decision has been responsible for the formulation of the rule set out in the case of *Thereaux* v. *Northern Pacific Railway Co., supra,* namely, *The Harrisburg*, 119, U. S. 199, 30 L. Ed. 358.

And in the case of *Brunswick Terminal Co.* v. *National Bank of Baltimore* (1900), 48 L. R. A. 625, 40 C. C. A. (4th Cir.), 22, 99 Fed. 635, (*certiorari denied* in (1900) 178 U. S.

611, 44 L. Ed. 1215, 20 Sup. Ct. Rep. 1029), this Court refused to review a decision of the United States Circuit Court of Appeals for the Fourth Circuit, holding that a Georgia limitation of twenty years specifically applicable to a Georgia statute imposing certain liabilities upon stockholders should govern the time within which a suit based upon such statutory liability could be brought in Maryland, the limitation period in Maryland for like actions being three years, on the ground that "where a statutory liability is sought to be enforced, and the statute prescribes the period of limitation, the law of the forum, where contrary thereto, does not govern."

We submit that the reasoning which motivated the Court to deny the writ of certiorari in the *Brunswick* case alone would amply warrant a denial of the writ in the case at bar.

D. We agree with Petitioner that the questions here involved are certainly important, but we submit that they are not grave questions of public importance involving conflicting decisions between the highest court of the State and the Federal Court sitting in that State.

As pointed out heretofore, the Tennessee Supreme Court has never directly passed upon the question here at issue. See case of *Parsons* v. *American Trust and Banking Co., supra.*

E. We submit that the Circuit Court of Appeals has not so far departed from the accepted and usual course of judicial proceedings, or so far sustained such a departure from a lower court as to call for an exercise of this Court's power of supervision.

F. The Circuit Court of Appeals has not decided an important question of *federal law* which has not been, but should be settled by this Court.

II.

There is no Error in The Action of The Circuit Court of Appeals in Setting Aside The Judgment of The District Court And Remanding The Case For Trial on Its Merits, Because:

A.

SECTION 413 OF THE SOUTH CAROLINA CODE OF 1932, PROVIDING A LIMITATION OF SIX YEARS FOR ACTIONS BROUGHT UNDER SECTION 411 OF THE SOUTH CAROLINA CODE IS A SPECIFIC LIMITATION SET UP AT THE TIME THE NEW CAUSE OF ACTION WAS CREATED, IS A MATTER OF RIGHT AND NOT A MATTER OF REMEDY, AND, THEREFORE, GOES WITH THE CAUSE OF ACTION CREATED BY SECTION 411 AS A MATTER OF RIGHT WHEREVER IT IS SUED UPON, AND IS CONTROLLING WHEN SUED UPON IN TENNESSEE.

There is no conflict in the decisions as to whether a specific limitation set up with a new statutory cause of action for death is a matter of right and limits the life of the new statutory cause of action. See the following cases:

1. *Boyd* v. *Clark*, 8 Fed. 849
2. *Thereaux* v. *Northern Pacific Railway Co., supra*
3. *The Harrisburg*, 119 U. S. 199, 30 L. Ed. 358
4. *Keep* v. *National Tube Co., supra*
5. *Coffman* v. *Wood*, 5 Fed. Supp. 706
6. *The Vestris*, 53 Fed. (2d) 847
7. *Negaubauer* v. *Great Northern Ry. Co.*, 95 Minn. 184, 104 Am. St. Rep. 674.
8. *Weaver* v. *Baltimore & Ohio R. R.*, 21 D. C. 499.

There is a conflict of authority among several state courts over whether a foreign specific limitation longer than a specific limitation for death actions in the forum state shall control over a shorter forum limitation. (For allowing the foreign specific limitation to control: *Negaubauer* v. *Great*

Northern Ry. Co. (Minn.) *supra, Cristilly* v. *Warner* (Conn.) 87 Conn. 461, 88 Atl. 711, *Louisville & N. R. R.* v. *Burkhart,* 154 Ky. 92, 157 S. W. 18; Against allowing the foreign specific limitation to control: *Tieffenbrun* v. *Flannery* (N.C.) 198 N. C. 397, 151 S. E. 857. But we assume that the Court is not at this time particularly interested in any state decisions other than those of South Carolina and Tennessee. On the other hand, the Federal Courts have been in complete accord in developing the rule allowing the longer foreign specific limitation in death actions to govern the time in which the action must be commenced in the forum state as a matter of right, regardless of the fact that forum specific limitation is shorter than the foreign limitation and has expired when the action coming from the foreign state is brought in the forum state. See the following cases:

1. *Thereaux* v. *Northern Pacific R. R. Co., supra*
2. *Keep* v. *National Tube Co., supra*
3. *Coffman* v. *Wood, supra*
4. *Weaver* v. *Baltimore & Ohio R. R., supra.*

The basic reasoning for these decisions is succinctly stated in the case of *Thereaux* v. *Northern Pacific Railway Co., supra.* In the Thereaux case action was brought for wrongful death in Minnesota on a cause of action arising in Montana. Montana had a specific limitation on death actions arising in Montana of three years, Minnesota a specific limitation on death actions arising in Minnesota of two years. Action was brought in Minnesota within three years but after the expiration of two years. In holding the specific limitation of the state where the cause of action arose controlled, the Court made the following statement at page 87:

> "To refuse to entertain such a suit within three years would be to subtract from the liability, and

> to impair the right intended to be conferred by the laws of Montana; for the period allowed in which to enforce the liability, as we have before shown, is a substantial part of the liability imposed and of the right intended to be created. Moreover, it cannot be said that, by entertaining the suit after the lapse of two years, the laws of Minnesota would be set at naught, or any well-defined public policy of that state violated; for, in *contemplation of law,* the two-year limitation prescribed by the statute of that state (chapter 77, Section 2, *supra*) was only intended to apply, and *can only apply, to causes of action, which originate in that state, and not to causes of action that originate elsewhere.* (Italics ours). We are of the opinion, therefore, that the circuit court erred in sustaining the motion for judgment on the pleading."

It is true that the case at bar on the facts does not at first glance fall entirely within the operation of this rule, for the reason that Tennessee, the forum state, has no specific limitation controlling actions for wrongful death arising either in Tennessee, or in a foreign state. However, your Respondent submits that the case of *H. P. Fowlkes, Admr.,* v. *N. & D. R. R. Co., supra,* so confines the application of the Tennessee one year limitation for personal injuries (Section 8595) to survival death statutes in general (that is, death statutes in which the basic cause of action is one for personal injury and not one for death), and in particular, to causes of action for death arising in Tennessee under Section 8236 (which is a survival statute), that the case at bar falls within the reasoning of the cases above cited, particularly the case of *Thereaux* v. *Northern Pacific Railway Co., supra.*

This was apparently the holding of the Circuit Court of Appeals in the instant case of *J. T. Wilson, Admr.,* v. *Massengill* etc., 124 F. (2d) 666, for in that decision the Circuit

Court recognized the fact that the Tennessee Code Section 8236 and the South Carolina Code Section 411, created entirely different causes of action, that Tennessee Code 8595 was a personal injury limitation made applicable only to Tennessee Code Section 8236 by the Tennessee Supreme Court's decision of *H. P. Fowlkes Admr.*, v. *N. & D. R. R. Co., supra,* because it was a survival statute, so that the South Carolina limitation of six years (Section 413), being a part of the right created in South Carolina, could control in Tennessee without violation of any basic public policy of the state of Tennessee, under the rule and reasoning of the case of *Thereaux* v. *Northern Pacific Railway Co.,* supra.

It is, therefore, Respondent's contention that, upon the authority of *Whitlow* v. *Nashville etc., Railroad Co.,* 114 Tenn. (6 Cates) 344, *Sharp* v. *Cincinnati etc., Railroad Co.,* 133 Tenn. 1, at p. 16, and *Hartman* v. *Duke,* 160 Tenn. 134, Tennessee is, under the rules of comity existing between the states, bound to give effect to the *foreign rights* created by the South Carolina statutes, one of which rights is the six year limitation set out in Section 413 of the South Carolina Code, unless Tennessee has some broad public policy which will be infringed by thus giving effect to the foreign right; and that the Federal Courts will enforce this Tennessee principle of conflicts of laws, allowing the South Carolina limitation to control as a matter of right in the case at bar, in view of the fact that no public policy of the State of Tennessee could be enfringed thereby.

> See *Allen-Bradley, Local* v. *Wisconsin Empl't. Rel. Bd.* Vol. 86 No. 11 U. S. Supreme Court Law Ed., Advance Opinion (1942), pp. 802, 806.

In regard to the question raised by Petitioner at page 14 et seq of its brief as to whether the South Carolina Code Section 413 is so worded as to constitute a mere limitation rather than a matter of right: The Supreme Court of South

Carolina has not directly interpreted Section 413 in this connection, but its holding in the case of *Dennis* v. *Atlantic Coast Line R. Co.*, 70 S. C. 254, 49 S. E. 869, 106 Am. State Rep. 746, interpreting a North Carolina limitation statute in a death case arising in North Carolina and sued upon in South Carolina is indicative of the manner in which the South Carolina Supreme Court would interpret Section 413 of the South Carolina Code of 1932.

See also:
Annotation in 67 A. L. R. 1070 to 1075.

B.

1. Section 8595 of Williams Tennessee Code annotated (1934) is not applicable to the cause of action for death created in Section 411 of the South Carolina Code of 1932.

Respondent takes the position that if the forum state has neither a specific nor general limitation applicable to the new cause of action for wrongful death which arose in the foreign state and which bars same, then the foreign specific limitation applies. The general rule governing this situation is stated by Wharton on CONFLICT OF LAWS (3rd Edition), at page 1266, and is as follows:

> "If there is no general or special limitation at the forum applicable to foreign causes of action, the action may doubtless be entertained if the bar of the foreign statute has not fallen."

The case of *Weaver* v. *Baltimore and Ohio R. R.* (1893), 21 D. C., 499, is the leading case on this general proposition. See particularly page 506 et seq.

The importance of the *Weaver* case is found in the Court's insistence that in order to apply certain specified limitations the cause of action sued upon must first be property classified.

In the *Weaver* case the Court reasoned that an action for wrongful death was a tort action, one based upon negligence, and, therefore, was an action on the case, and it was an easy matter to apply the general limitation of three years (Statute of Maryland of 1715) which specifically set a time limit for *all actions on the case*, but which under the facts did not bar the action coming from West Virginia, so that the foreign limitation was given effect. We submit that Section 8595 of the Tennessee Code is not so broad, and creates a limitation only for causes of action for personal injury, which is only one of several actions on the case.

In the case at bar Respondent submits that in order for the Court to apply the Tennessee limitation for personal injuries, Section 8595, it must examine the cause of action created by Section 411 of the South Carolina Code (upon which statute the present action is brought) and find that the cause of action created therein is one for personal injury accruing to the injured party but which survives his death for the benefit of certain designated beneficiaries.

We submit that Section 411 of the South Carolina Code of 1932 is not a survival statute but creates a new cause of action for death which accrues directly to the deceased's beneficiaries the moment the injured party dies.

Wellman v. *Bethea* (S. C.) 243 Fed. 222
Osten v. *So. Ry.*, 76 S. C. 368, 57 S. E. 196
In Re: *Mayo's Estate*, 60 S. C. 401, 38 S. E. 634, 54 A. L. R. 660
Claussen v. *Brothers* (1928) 148 S. C. 1, 145 S. E. 539, 61 A. L. R. 832 at 828-9.

See particularly the cases of *In Re*: *Mayo's Estate supra*, and *Claussen* v. *Brothers, supra*. The *Claussen* case makes very clear the difference between the South Carolina death statute Section 411, and the South Carolina survival statute Section 419.

Under Section 411 the cause of action accrues upon the deceased's death and does not accrue to the deceased, but to his next of kin, the damages assessable being damages which the next of kin suffer because of the death, including the wounded feelings of said beneficiaries, these damages being free from the claims of creditors.

Wellman v. *Bethea, supra*
Claussen v. *Brothers, supra*

More specifically, under Section 411 when the deceased dies a liability is created which is enforceable only by his personal representative on behalf of the deceased's next of kin.

Grainger v. *Greeneville S. & A. Ry.*, 101 S. C. 399, 85 S. E. 968.

It is true, however, that under Section 419 of the South Carolina Code (See Appendix), the deceased has a cause of action for personal injuries which, upon his death, survives, and the damages assessable thereunder are based upon the deceased's personal suffering etc., and are subject to the claims of creditors.

Grainger v. *Greeneville S. & A. Ry., supra*
Bennett v. *Spartanburg Ry. Co., etc.*, 97 S. C. 27, 81 S. E. 189.

But they are separate and distinct, and judgment on one is not *res adjudicata* as to the other.

Grainger v. *Greeneville, supra*
Bennett v. *Spartanburg*, supra

As a matter of fact, these two separate causes of action cannot be joined in the same complaint.

Grainger v. *Greeneville, supra*
Bennett v. *Spartanburg*, supra

It is true that there is an element of injury in every wrongful death action, and by the statute creating a cause of action for death the right attaches only if the person wronged could have sued in his life time; and in South Carolina, under Section 414 (See Appendix), if the deceased in his life time executes a release for his injuries, or recovers a judgment for same, the right of action for death created by Section 411 does not come into existence in order to prevent a double recovery. However, South Carolina has held that, when death occurs without any prior release or judgment, by virtue of Section 411 and 419 two separate and distinct causes of action come into being, notwithstanding Section 414, one for death and one for personal injuries which survives the death of the injured party. See the case of *In Re: Mayo's Estate, supra.*

We would like to point out here that Section 414 does not apply to Section 419, but only to Section 411, since Section 419 simply provides for the survival of a cause of action for personal injuries which upon a recovery by the deceased for injuries prior to his death would cease to exist. The mere fact that the South Carolina Legislature deemed it necessary to enact Section 414 indicates that they considered Section 411 as a completely new cause of action which had no relation to the right of action for personal injuries in the deceased.

However, Section 8236 of Williams Tennessee Code Anno. (1934) does *not* create a new cause of action but simply preserves the cause of action for personal injury in the deceased which would otherwise be extinguished by his death.

H. P. Fowlkes, Admr. v. *N. & D. R. R. Co.*, supra
Whaley v. *Catlett*, 103 Tenn. 347, at 351 et seq., 53 S. W. 131
Love v. *Southern Ry.*, 108 Tenn. 104, at 125
Davidson Benedict Co. v. *Severson*, 109 Tenn. (1 Cates) 572, at 589
Elliott v. *Felton*, 119 Fed. 270, at 274 et. seq.

At page 351 the Court, in the case of *Whaley* v. *Catlett*, *supra*, makes the following statement:

> "We are of opinion that a careful reading of the statutes can lead to no other conclusion than that they provide alone for the continued existence and passing of the right of action of the deceased, and not for any new, independent cause of action in his widow, children, or next of kin."

Under the case of *H. P. Fowlkes, Admr. N. & D. R. R. Co.*, *supra*, Section 8595 of the Tennessee Code is made applicable to Section 8236 of the Tennessee Code simply because the cause of action is for the personal injury of the deceased, and *accrues* to the deceased when he is injured. And under the *Fowlkes* case the limitation begins to run, not from the date of the injured party's death, but from the date he is injured. However, the cause of action created by Section 411 of the South Carolina Code does not accrue until the injured party dies and the cause of action does not accrue then to the injured party, but directly to his beneficiaries, and is a cause of action for death, not one for *personal injury*.

We submit that in determining what the basic cause of action is for the purpose of applying specified statutes of limitation it is necessary to determine when and to whom the cause of action accrues. See the case of *Federal Reserve Bank* v. *Atlanta Trust Company* (1937) 91 Fed. (2d) 283, 117 A. L. R. 1160. See also the case of *Whaley* v. *Catlett*, *supra*, p. 355 et seq.

Under the reasoning of the case of *Federal Reserve Bank* v. *Atlanta Trust Company*, *supra*, the cause of action sued upon in the case at bar, as created by Section 411 (S. C. Code), does not come into existence until the injured party dies. Consequently, the right claimed is not a right in the deceased based upon his cause of action for personal injury, but a right of the beneficiaries based upon the death of the

injured party. The right claimed is the pecuniary loss to the beneficiaries caused by the death of the injured party, and not the deceased injury; and not until the injured party dies, can the action be brought under Section 411, and not until the injured party dies does the South Carolina limitation (Sec. 413) of six years begin to run.

It is true that even under Section 8236 of Williams Tennessee Code Anno. suit cannot be brought until the injured party dies. But even then the right of action is still the right of the deceased for his personal injuries. In the case of *Whaley* v. *Catlett, supra,* the court makes the following statement at page 352:

> "In *Haley* v. *Railroad,* 7 Bax., 242, it is held that the right of action of the deceased, with all its incidents, passes, (to the personal representative) and it must be treated as if the injured party had brought it. And again, in *Loague* v. *Railroad,* 7 Pick., 460-462, it is held that the right of action is still the right of the deceased, although under Section 4029, Act of 1883, Ch. 186, the recovery may include as an element such damages as are sustained by the person to whom the statute gives the recovery."

And by the decision in the case of *H. P. Fowlkes, Admr.* v. *N. & D. R. R. Co., supra,* it is clear that the cause of action accrues before death and accrues, not to the beneficiaries, but to the injured party, and is a cause of action for *personal injury* in the deceased which survives for the benefit of his next of kin, at least for the purpose of applying Section 8595 thereto. See case of *Whaley* v. *Catlett, supra,* at page 355 et. seq.

We submit, therefore, that the causes of action created by Tennessee Section 8236 and South Carolina Section 411 are two separate and distinct causes of action. The first is a cause of action for *personal injuries* accruing to the in-

jured party and which is simply preserved by statutory enactment after his death. The second is a cause of action for death itself which accrues directly to the deceased's beneficiaries, but not until the injured party dies. We submit, therefore, that since Section 8595 of the Tennessee Code is a limitation on causes of action for personal injury it is not applicable to Section 411 of the South Carolina Code which creates a cause of action for death.

2. IF SOME TENNESSEE LIMITATION MUST APPLY TO SECTION 411 OF THE SOUTH CAROLINA CODE, SECTION 8106 OF WILLIAMS, TENNESSEE CODE ANNO. IS THE APPLICABLE STATUTE.

Section 8601 is a general statute of limitations and is as follows:

> "Actions against guardians, executors, administrators, sheriffs, clerks, and other public officers on their bonds, actions on judgments and decrees of courts of record of this or any other state or government, and *all other cases* not expressly provided for, shall be commenced within *ten years* after the cause of action accrued." (Italics ours)

This Code Section 8601 must be read with Tennessee Code Section 8592, and reading these two sections together it is clear that the only general limitation in Tennessee is this ten year limitation which applies to "all other cases not expressly provided for." See the case of *Barnes* v. *Barnes*, 157 Tenn. 332, 336-37-38.

Section 8592 is as follows:

> "All civil actions, other than those for causes embraced in the preceding article, shall be commenced after the cause of action has accrued, within the periods prescribed in this chapter, *unless otherwise expressly provided.*" (Italics ours).

We submit that Section 8601 is broad and general enough to cover the case at bar brought upon Section 411 of the South Carolina Code and, as a matter of fact, is the only Tennessee limitation which is applicable to Section 411. And, if any Tennessee limitation must control the action at bar, we submit that it is this general limitation statute, Section 8601.

Since Respondent's cause of action under Section 411 of the South Carolina Code is still in existence (the six year provided for in Section 413 of the South Carolina Code not having expired), and the limitation of Section 8601 (Tenn. Code) is for ten years, we submit that the instant case is not barred but must be given a hearing on its merits.

It is therefore submitted that the petition for writ of certiorari should be denied.

Respectfully,

JOSEPH K. BROWN,
Bristol, Tennessee.
BENJAMIN S. GORE,
Bristol, Tennessee.
CHARLES M. GORE,
Bristol, Tennessee.
J. C. LONG,
Charleston, South Carolina.
Attorneys for Respondent.

APPENDIX.

The following are additional sections of the South Carolina Code of 1932, which have an indirect bearing on the case at bar:

Sec. 414. EXCEPTION TO LIMITATION OF ACTIONS FOR WRONGFUL DEATH.—The provisions of Section 411, 412 and 413 of this chapter shall not apply to any cause where the person injured has, for such injury, brought action, which has proceeded to trial and final judgment before his or her death.

Sec. 419. SURVIVAL OF RIGHT OF ACTION.—Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property, shall survive both to and against the personal or real representative (as the case may be) of the deceased persons, and the legal representatives of insolvent persons, and defunct or insolvent corporations, any law or rule to the contrary notwithstanding.